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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RODNEY GREEN, Defendant and Appellant.	A159405 (Alameda County Super. Ct. No. 155949)

In 2008, a jury convicted defendant Rodney Green of second degree murder (Pen. Code, § 187, subd. (a))[1] and found true the allegation that he personally and intentionally discharged a firearm causing the victim's death (§ 12022.53, subd. (d)). He was sentenced to 40 years to life in prison. Subsequently, defendant filed a petition for resentencing under section 1170.95. The trial court denied defendant's petition, finding he was convicted as the actual killer.

His court appointed counsel has filed a brief raising no issue and seeking our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Counsel has advised defendant of his right to file a supplemental brief to bring to this court's attention any issue he believes deserves review. Defendant has not done so. Our review of the

[1] All subsequent statutory references are to the Penal Code.

entire record reveals no arguable issues cognizable in this appeal. We therefore affirm.

BACKGROUND

Defendant was charged with one count of murder and a firearm enhancement based on the 2003 killing of Darryl Davis.[2] In short, the evidence at trial showed that following a brawl that began in an Oakland nightclub, the victim was shot dead outside in a crowded parking lot. Kay Daniels and Jeffrey Brown each testified that they knew defendant from their neighborhood in North Richmond and identified him as the shooter on the night in question. Daniels and Brown had been in the nightclub and left when security guards came in to break up a fight. From about 44 feet away, Daniels, who had a " 'bird's eye view of what was going on,' " saw the victim in a group of people swinging punches at each other. As Daniels watched the fight, he heard a strange noise, and when he heard it again he realized it was a gunshot. Daniels scanned the parking lot, noticed a " 'flash,' " then saw defendant standing with his arm extended holding a gun. He had a clear view of defendant because everyone around defendant had dropped to the ground.

Brown saw the victim fighting with people outside of the nightclub. Brown stood about 18 feet away from the fight. Brown looked back toward the club and noticed defendant walking across the street toward the parking lot where the fight was taking place. Brown turned his attention back to the fight and then heard some gunshots. Brown looked in the direction of the shots and saw defendant bringing his right arm down from the shoulder

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[2] The facts involving Green's conviction are drawn from our opinion in Green's direct appeal. (*People v. Green* (Nov. 10, 2010, A123249 [nonpub. opn.].)

position. Defendant had a semi-automatic weapon in his hand and was about 44 feet away from the group of people fighting, and his arm was pointed in the direction of that group. Brown was about 35 feet away from defendant when he saw him with the gun. After the shots were fired, Brown saw the victim " 'hit the ground' . . . ."

The jury convicted defendant of second degree murder (§ 187, subd. (a)) and also found true the allegation that he personally and intentionally discharged a firearm causing the death of the victim, under section 12022.53, subdivision (d). The trial court sentenced defendant to an indeterminate term of 15 years to life for the offense of second degree murder. Pursuant to section 12022.53, subdivision (d), the trial court also sentenced defendant to a consecutive term of 25 years on the firearm allegation, for a total term of 40 years to life. Defendant appealed, and we affirmed the judgment in 2010.

In January 2019, defendant filed a petition for resentencing under section 1170.95. He alleged he was convicted of second degree murder under the natural and probable consequences doctrine and could not be convicted of murder because of changes to section 188. On January 16, 2019, without appointing counsel, the trial court denied defendant's petition for failure to make a prima facie showing of entitlement to relief under section 1170.95. In its order, the court stated defendant was not entitled to relief because he was "the actual killer" and was "convicted on a valid theory of murder which survives the changes to Penal Code sections 188 and 189 . . . ." Defendant did not appeal the denial of his section 1170.95 petition.

In November 2019, defendant filed a second petition for resentencing under section 1170.95, arguing he was entitled to a hearing. In its December 13, 2019 order, the trial court again summarily denied the petition without appointing counsel. In its order, the court explained that defendant's

failure to appeal the denial of his first petition for resentencing meant that the prior order was final and the court was without jurisdiction to consider the November filing. In any event, even considering the subsequent filing as a motion for reconsideration, the court denied the petition for the same reasons as stated in its prior order: "That is, defendant's conviction was based on a valid theory and, as the actual killer, he could still be convicted of murder. (§ 1170.95, subd. (a)(3), (b)(1)(A), (c), 188, subd. (a), 189, subd. (e)(1).)" (*Sic.*)

DISCUSSION

Initially, we recognize the court in *People v. Cole* (2020) 52 Cal.App.5th 1023, 1028, review granted Oct. 14, 2020, S264278, recently held "that *Wende*'s constitutional underpinnings do not apply to appeals from the denial of postconviction relief," and that *People v. Serrano* (2012) 211 Cal.App.4th 496, 500, 503, held the *Wende* " 'prophylactic framework' " does not extend beyond the first appeal of right from a criminal conviction. Nonetheless, exercising our discretion, we have reviewed the record and have found no arguable issues. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544, fn. 8; *People v. Flores* (2020) 54 Cal.App.5th 266, 273–274.)

Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill 1437) was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).)

Senate Bill 1437 "redefined 'malice' in section 188. Now, to be convicted of murder, a principal must act with malice aforethought; malice

can no longer 'be imputed to a person based solely on [his or her] participation in a crime.' (§ 188, subd. (a)(3).)" (*In re R.G.* (2019) 35 Cal.App.5th 141, 144.) Senate Bill 1437 "amended section 189, which defines the degrees of murder, by limiting the scope of first degree murder liability under a felony-murder theory. (§ 189, subd. (e).)" (*People v. Turner* (2020) 45 Cal.App.5th 428, 433.)

Senate Bill 1437 "also added section 1170.95 to the Penal Code, which permits an individual convicted of felony murder or murder under a natural and probable consequences theory to petition the sentencing court to vacate the conviction and to be resentenced on any remaining counts if he or she could not have been convicted of first or second degree murder because of Senate Bill 1437's changes to sections 188 and 189." (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 326, review granted Mar. 18, 2020, S260493.)

Here, nothing in the record of conviction (including our prior opinion) establishes that defendant was convicted of first or second degree murder pursuant to the felony-murder rule or the natural and probable consequences doctrine. Indeed, application of the natural and probable consequences doctrine to defendant would have been nonsensical, as "culpability under the natural and probable consequences doctrine is vicarious" (*People v. Chiu* (2014) 59 Cal.4th 155, 164, superseded by statute as stated in *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103, review granted Nov. 13, 2019, S258175) and when the defendant is the sole perpetrator, his or her liability for a crime is, by definition, not vicarious. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 901 ["The natural and probable consequences doctrine applies . . . to aiders and abettors and conspirators"]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1123 ["The actual perpetrator must have whatever mental state is required for each crime charged" but "the aider and abettor is guilty not only

of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense"].)

"Unlike a case based upon the 'natural and probable consequences' theory of accomplice liability . . . , the facts of this case did not require the jury to analyze two distinct transactions—a target crime, such as robbery, and a nontarget crime, such as murder—and determine whether a murder by a confederate was the natural and probable consequence of a robbery the defendant accomplice had agreed to aid and abet." (*People v. Martinez* (2007) 154 Cal.App.4th 314, 333.) Here, defendant was charged as the sole perpetrator with one count of murder based upon a single transaction—the shooting death of the victim in the parking lot.

Two eyewitnesses testified that they saw defendant shoot the victim. Consistent with the evidence presented at trial, the jury found defendant personally and intentionally discharged a firearm causing death, which constitutes an implicit finding that he was the actual killer. (See *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58, review granted Mar. 18, 2020, S260410.) We are not free to disregard this finding.[3]

As the victim's actual killer, defendant is not eligible for resentencing under section 1170.95. (See § 189, subd. (e)(1); *People v. Cornelius, supra*, 44 Cal.App.5th at p. 58, rev.gr. [affirming summary denial of resentencing petition where petitioner was the actual killer who discharged a firearm causing death].)

We note that currently before the Supreme Court are the issues (1) whether a trial court can rely on the record of conviction to conclude that a

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[3] Notably, in his prior appeal of his conviction, defendant did not challenge the sufficiency of the evidence.

defendant has failed to make a prima facie showing of eligibility for relief under section 1170.95 and (2) when the right to appointed counsel arises under that statute. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, review granted Mar. 18, 2020, S260598.) Even if the trial court here procedurally erred by summarily denying the petition, defendant is ineligible for relief as a matter of law. Thus, he cannot demonstrate prejudice, and remand for the appointment of counsel and a hearing on the petition would be futile. (See *People v. Cornelius*, *supra*, 44 Cal.App.5th at p. 58, rev.gr.)

Having independently reviewed the record, we conclude there are no reasonably arguable issues requiring further review. We thus affirm the order denying defendant's resentencing petition.

DISPOSITION

The December 13, 2019 order denying defendant's petition for resentencing under section 1170.95 is affirmed.

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Jackson, J.

WE CONCUR:

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Siggins, P. J.

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Petrou, J.

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